

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 7, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP773-CR

Cir. Ct. No. 2014CF153

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN H. PRZYBYLA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Adams County: ALAN J. WHITE, Judge. *Affirmed.*

Before Sherman, Blanchard and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. John Przybyla appeals a judgment of conviction for operating a motor vehicle while intoxicated as a tenth offense. Przybyla also

appeals a circuit court order denying his postconviction motion. Przybyla argues that he is entitled to resentencing due to an error in one of the jury instructions. Because the claimed error does not entitle Przybyla to the relief he requests, we affirm.

BACKGROUND

¶2 We keep the background facts brief and provide additional facts as relevant in the discussion section. A jury found Przybyla guilty of operating a motor vehicle while intoxicated (“the OWI charge”) and operating with a prohibited alcohol content (“the PAC charge”), both as a tenth offense.¹ After the jury rendered its verdicts, the circuit court dismissed the PAC charge, as required by WIS. STAT. § 346.63(1)(c) (2015-16).² The circuit court sentenced Przybyla to seven years initial confinement and four years extended supervision on the OWI charge.

¶3 Przybyla then filed a postconviction motion, arguing that one of the jury instructions for the OWI charge was erroneous. He further contended that his attorney’s failure to object to this instruction amounted to ineffective assistance of counsel. During the motion hearing, both parties agreed that the jury instruction was erroneous but disagreed on whether the error was harmless. Przybyla argued

¹ The jury also found Przybyla guilty of operating after revocation as a third offense. Przybyla does not appeal that conviction.

² The circuit court dismissed the PAC charge pursuant to WIS. STAT. § 346.63, which allows a prosecutor to charge the same conduct as both operating while intoxicated and operating with a prohibited alcohol content. *See* § 346.63(1)(c). However, this statute further provides that if a defendant “is found guilty of any combination of [these offenses] for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing.” *Id.* All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

that the best approach was for the circuit court to resentence him on the PAC charge instead of the OWI charge. Przybyla confirmed that he was not seeking a new trial on the OWI charge. The circuit court denied Przybyla's motion. Przybyla appeals.

DISCUSSION

¶4 Przybyla contends that the erroneous jury instruction means that his current sentence on the OWI charge violates his due process right to be sentenced based on accurate information. *See State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. In order to be entitled to resentencing, a defendant must establish that there was information before the circuit court that was “inaccurate and that the court actually relied on the inaccurate information in the sentencing.” *Id.*, ¶26. Przybyla has the burden of proving both factors by clear and convincing evidence. *See State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423.

¶5 Przybyla has failed to connect the dots between the erroneous jury instruction and the relief he seeks. Przybyla's argument starts with the flawed jury instruction, which stated:

If you are satisfied beyond a reasonable doubt that there was .02 grams or more of alcohol in 100 [milliliters] of the defendant's blood at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, but you are not required to do so.

This instruction is an incorrect statement of Wisconsin law, which provides that an alcohol concentration of more than .04 and less than .08 is relevant to intoxication. *See WIS. STAT. § 885.235(1g)(b)*. The State concedes that the jury was not

properly instructed on how to use evidence of blood alcohol levels when deliberating on the OWI charge. Accordingly, Przybyla contends that a properly instructed jury might have acquitted him of the OWI charge.

¶6 So far, Przybyla's argument makes sense. However, Przybyla's argument goes astray when he proposes resentencing as the appropriate remedy for this erroneous jury instruction. Przybyla's claim for resentencing rests on the apparent assumption that, instead of asking the circuit court to vacate his conviction on the OWI charge, he can, rather, ask the circuit court to ignore this conviction and resentence him based on the PAC charge even though that charge was dismissed. As the State points out in its response, it has viable arguments that Przybyla would have been convicted of the OWI charge even without the incorrect jury instruction. Przybyla does not point us to any authority that would support his proposed end run around his OWI conviction.

¶7 Moreover, the erroneous jury instruction does not give Przybyla the necessary foundation to argue that the circuit court sentenced Przybyla based on inaccurate information. Przybyla has pointed to a potential infirmity in his conviction for the OWI charge but fails to explain on what basis the remedy could be resentencing on a separate, dismissed charge. Therefore, Przybyla has not satisfied his burden of showing that he is entitled to resentencing. *See Payette*, 313 Wis. 2d 39, ¶46.

CONCLUSION

¶8 For the foregoing reasons, we affirm the judgment of conviction as well as the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

